

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TERRI G.,

No. 1:20-CV-03206-JAG

Plaintiff,

v.

KILOLO KIJAKAZI,  
ACTING COMMISSIONER OF  
SOCIAL SECURITY,

ORDER GRANTING IN PART  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
REMANDING FOR ADDITIONAL  
PROCEEDINGS

Defendant.

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 15, 16. Attorney D. James Tree represents Terri G. (Plaintiff); Special Assistant United States Attorney Frederick Fripps represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 4. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**I. JURISDICTION**

Plaintiff filed an application for Supplemental Security Income on August 19, 2013, alleging disability since June 30, 2008, due to anxiety, back pain,

1 bilateral knee pain, nerve damage in the left leg, and neuropathy in both feet. Tr.  
2 68. The application was denied initially and upon reconsideration. Tr. 123-31, 135-  
3 40. Administrative Law Judge (ALJ) Laura Valente held a hearing on January 19,  
4 2016, Tr. 39-51, and issued an unfavorable decision on May 19, 2016. Tr. 96-107.  
5 Plaintiff requested review of the ALJ's decision from the Appeals Council and the  
6 Appeals Council remanded the claim for further proceedings on February 8, 2018.  
7 Tr. 115-18.

8 On December 2, 2019, ALJ Valente held a remand hearing. Tr. 52-66. On  
9 January 8, 2020, ALJ Valente issued an unfavorable decision, finding substance  
10 abuse to be material to a finding of disability. Tr. 15-29. Plaintiff requested review  
11 from the Appeals Council and the Appeals Council denied the request on  
12 September 20, 2020. Tr. 1-5. The ALJ's January 2020 decision is the final decision  
13 of the Commissioner, which is appealable to the district court pursuant to 42  
14 U.S.C. § 405(g). Plaintiff filed this action for judicial review on November 19,  
15 2020. ECF No. 1.

## 16 II. STATEMENT OF FACTS

17 The facts of the case are set forth in detail in the transcript of proceedings  
18 and are only briefly summarized here. Plaintiff was born in 1976 and was 37 years  
19 old when she filed her application. Tr. 68. She has her GED and has worked in  
20 laundry, janitorial, and cashiering jobs, having last worked in 2008 prior to  
21 sustaining a shoulder injury. Tr. 693. In 2005 and 2006 she had back surgery, with  
22 the placement of hardware and two rods following a lumbar fusion and  
23 laminectomy. Tr. 655, 1060, 1408. She continued to struggle with back pain for  
24 years after the surgery. In 2013 and 2014 she began reporting anxiety and  
25 depression, largely related to stressful life circumstances. Tr. 630-32, 691, 1010-  
26 11. In 2015 following her son's enlistment in the armed services, her depression  
27 and anxiety worsened, with her family reporting her behavior becoming  
28 increasingly unpredictable. Tr. 1787-89. In 2017, she began drinking heavily and

1 subsequently had numerous suicidal gestures and medication overdoses. Tr. 1481,  
 2 1557, 1563, 2366, 2640, 2948. In 2019 she reported she drank to numb her  
 3 physical pain and mental health issues, which became substantially worse in 2017.  
 4 Tr. 1488, 1494, 1530.

### 5 III. STANDARD OF REVIEW

6 The ALJ is responsible for determining credibility, resolving conflicts in  
 7 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
 8 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with  
 9 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
 10 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
 11 only if it is not supported by substantial evidence or if it is based on legal error.  
 12 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
 13 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
 14 1098. Put another way, substantial evidence is such relevant evidence as a  
 15 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
 16 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one  
 17 rational interpretation, the Court may not substitute its judgment for that of the  
 18 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,  
 19 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the  
 20 administrative findings, or if conflicting evidence supports a finding of either  
 21 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*  
 22 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision  
 23 supported by substantial evidence will be set aside if the proper legal standards  
 24 were not applied in weighing the evidence and making the decision. *Brawner v.*  
 25 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### 26 IV. SEQUENTIAL EVALUATION PROCESS

27 The Commissioner has established a five-step sequential evaluation process  
 28 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*

1 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant  
2 bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d  
3 at 1098-1099. This burden is met once a claimant establishes that a physical or  
4 mental impairment prevents the claimant from engaging in past relevant work. 20  
5 C.F.R. § 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ  
6 proceeds to step five, and the burden shifts to the Commissioner to show (1) the  
7 claimant can make an adjustment to other work; and (2) the claimant can perform  
8 specific jobs that exist in the national economy. *Batson v. Commissioner of Social*  
9 *Sec. Admin.*, 359 F.3d 1190, 1193-1194 (9th Cir. 2004). If a claimant cannot make  
10 an adjustment to other work in the national economy, the claimant will be found  
11 disabled. 20 C.F.R. § 416.920(a)(4)(v).

12 “A finding of ‘disabled’ under the five-step inquiry does not automatically  
13 qualify a claimant for disability benefits.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th  
14 Cir. 2007) (citing *Bustamante v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001)).  
15 When there is medical evidence of drug or alcohol addiction (DAA), the ALJ must  
16 determine whether the drug or alcohol addiction is a material factor contributing to  
17 the disability. 20 C.F.R. § 416.935(a). In order to determine whether DAA is a  
18 material factor contributing to the disability, the ALJ must evaluate which of the  
19 physical and mental limitations would remain if the claimant stopped using drugs  
20 or alcohol, then determine whether any or all of the remaining limitations would be  
21 disabling. 20 C.F.R. § 416.935(b)(2). If the remaining limitations would not be  
22 disabling, DAA is a material contributing factor to the determination of  
23 disability. *Id.* If the remaining limitations would be disabling, the claimant is  
24 disabled independent of the DAA and the addiction is not a material contributing  
25 factor to disability. *Id.* The claimant has the burden of showing that DAA is not a  
26 material contributing factor to disability. *See Parra*, 481 F.3d at 748.

## V. ADMINISTRATIVE DECISION

On January 8, 2020, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act. Tr. 15-29.

At **step one**, the ALJ found Plaintiff had not engaged in substantial gainful activity since the alleged onset date. Tr. 18.

At step two, the ALJ determined Plaintiff had the following severe impairments: degenerative disc disease, peripheral neuropathy, alcohol abuse, and anxiety disorder. *Id.*

At **step three**, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. Tr. 18-20.

The ALJ assessed Plaintiff's residual functional capacity, including substance abuse, and found she could perform light exertion work with the following additional limitations:

Sit for one hour at a time, after which she needs to stand and stretch for a few minutes not away from the work station and could continue working in a different position, and sitting is available for six hours in an eight-hour workday; standing and walking is available for four hours in an eight-hour workday; has left lower extremity pushing and pulling, such as operation of foot pedals, at occasional; postural activities are all frequent, but should never climb ladders, ropes, or scaffolds and stooping and crawling are occasional; must avoid concentrated exposure to vibration and hazards, such as heights and dangerous machinery; must avoid concentrated exposure to extreme cold; not likely to attend work on a regular basis, would be off task at least one-third of the day, and limited to simple, routine tasks with no work with the general public and only superficial work with coworkers, meaning no coordination with work activity.

Tr 20

1       At **step four** the ALJ found Plaintiff was unable to perform her past relevant  
2 work as a cashier, janitor, or laundry worker. Tr. 21-22.

3       At **step five** the ALJ found that, including her substance use disorder, there  
4 were no jobs that existed in significant numbers in the national economy that  
5 Plaintiff could have performed. Tr. 22.

6       Because of Plaintiff's substance abuse, the ALJ further considered her  
7 abilities if she were to stop using drugs and alcohol. Tr. 23. The ALJ found  
8 Plaintiff's physical impairments would remain severe, but that her anxiety disorder  
9 would be a nonsevere impairment. Tr. 23. Absent substance use, the ALJ found  
10 Plaintiff would continue to not have an impairment or combination of impairments  
11 that met or medically equaled one of the listed impairments. Tr. 24.

12       The ALJ assessed Plaintiff's residual functional capacity in the absence of  
13 substance abuse and found her physical abilities would be unchanged, and she  
14 would still be capable of a reduced range of light work with the same postural and  
15 environmental limitations, but would no longer have any social or cognitive  
16 limitations. Tr. 24.

17       At **step four**, the ALJ found Plaintiff would continue to be unable to  
18 perform her past relevant work. Tr. 28.

19       At **step five**, the ALJ found that, considering Plaintiff's age, education, work  
20 experience and residual functional capacity were she to stop substance use,  
21 Plaintiff could perform jobs that existed in significant numbers in the national  
22 economy, specifically identifying the representative occupations of production  
23 assembler, outside deliverer, and storage rental clerk. Tr. 28.

24       The ALJ thus concluded Plaintiff's substance use disorder was a  
25 contributing factor material to the determination of disability, and therefore  
26 Plaintiff was not under a disability within the meaning of the Social Security Act at  
27 any time from the alleged onset date through the date of the decision. Tr. 29.

## 1 VI. ISSUES

2 The question presented is whether substantial evidence supports the ALJ's  
3 decision denying benefits and, if so, whether that decision is based on proper legal  
4 standards.

5 Plaintiff contends the ALJ erred by (1) improperly rejecting Plaintiff's  
6 symptom testimony; (2) improperly rejecting opinion evidence; and (3) making a  
7 determination of materiality of substance abuse that was not supported by  
8 substantial evidence.

## 9 VII. DISCUSSION

### 10 A. Plaintiff's Subjective Complaints.

11 Plaintiff contends the ALJ erred by improperly rejecting her subjective  
12 complaints. ECF No. 15 at 9-14.

13 It is the province of the ALJ to make credibility determinations. *Andrews v.*  
14 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be  
15 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231  
16 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying  
17 medical impairment, the ALJ may not discredit testimony as to the severity of an  
18 impairment merely because it is unsupported by medical evidence. *Reddick v.*  
19 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of  
20 malingering, the ALJ's reasons for rejecting the claimant's testimony must be  
21 "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.  
22 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General findings are  
23 insufficient: rather the ALJ must identify what testimony is not credible and what  
24 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*  
25 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

26 The ALJ concluded Plaintiff's medically determinable impairments could  
27 reasonably be expected to produce the alleged symptoms; however, Plaintiff's  
28 statements concerning the intensity, persistence and limiting effects of those

1 symptoms were not entirely consistent with the medical evidence and other  
2 evidence in the record. Tr. 26. Specifically, the ALJ found Plaintiff's statements  
3 were inconsistent with her activities, normal findings on exams, and the objective  
4 findings on imaging, and were undermined by her reports that her pain symptoms  
5 were relieved with medication. *Id.*

6 Plaintiff argues the ALJ failed to identify clear and convincing reasons for  
7 discounting her statements, as the activities noted were minimal and not  
8 inconsistent with her allegations, and the reports of improvement with medication  
9 were isolated and in context did not indicate resolution of her problems. ECF No.  
10 15 at 10-13. She further argues the ALJ selectively cherry-picked the record and  
11 ignored the numerous instances of exam findings that were supportive of Plaintiff's  
12 complaints, and that a lack of support from objective findings alone is an  
13 insufficient basis for discounting subjective reports of pain. *Id.* at 11-14. Defendant  
14 argues the ALJ reasonably considered Plaintiff's activities, reports of relief with  
15 medication, and the minimal objective findings in discounting her subjective  
16 complaints. ECF No. 16 at 3-5.<sup>1</sup>

17 The Court finds the ALJ failed to offer clear and convincing reasons for  
18 discounting Plaintiff's subjective reports. A claimant's daily activities may support  
19 an adverse credibility finding if the claimant's activities contradict their other  
20 testimony or if the claimant can spend a substantial part of the day engaged in  
21 functions transferable to a work setting. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.  
22

23 <sup>1</sup> Defendant also argues the ALJ noted Plaintiff was not always forthcoming about  
24 her substance abuse. ECF No. 16 at 5-6. The ALJ made no such finding, and thus  
25 this constitutes *post hoc* rationale that the Court will not consider. *See Orn v.*  
26 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (The Court will "review only the reasons  
27 provided by the ALJ in the disability determination and may not affirm the ALJ on  
28 a ground upon which he did not rely.").

1 2007). However, Ninth Circuit caselaw has been clear that the Social Security Act  
2 “does not require that claimants be utterly incapacitated to be eligible for benefits,  
3 and many home activities may not be easily transferable to a work environment  
4 where it might be impossible to rest periodically or take medication.” *Smolen v.*  
5 *Chater*, 80 F.3d 1273, 1287 n.7 (9th Cir. 1996). The Ninth Circuit has further  
6 stated:

7 We have repeatedly warned that ALJs must be especially cautious in  
8 concluding that daily activities are inconsistent with testimony about  
9 pain, because impairments that would unquestionably preclude work  
10 and all the pressures of a workplace environment will often be  
11 consistent with doing more than merely resting in bed all day.

12 *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014).

13 The ALJ noted Plaintiff’s activities included grocery shopping, light  
14 cleaning, and cooking, and that she could dress herself. Tr. 26. The ALJ failed to  
15 explain how any of these activities were inconsistent with Plaintiff’s reports or  
16 how they indicated an ability for full-time work. *Id.* The Court finds the ALJ’s  
17 discussion does not constitute a clear and convincing basis for disregarding  
18 Plaintiff’s subjective reports.

19 Evidence of medical treatment successfully relieving symptoms can  
20 undermine a claim of disability. *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th  
21 Cir. 2017). However, the citations offered by the ALJ do not indicate that  
22 Plaintiff’s treatment was successful, only that her pain was somewhat relieved by  
23 her pain medications at times, in combination with lying down and resting, and that  
24 her pain was aggravated by stairs, changing positions, sitting, twisting, bending,  
25 walking, and driving. Tr. 698, 988. The record also contains instances of Plaintiff  
26 reporting that her medications were not relieving her symptoms. Tr. 634, 958,  
27 1686, 2563. The ALJ’s conclusion that Plaintiff’s subjective pain complaints were  
28

1 not reliable due to her reports of symptom relief with medication is not supported  
 2 by substantial evidence.

3 The only other rationale offered by the ALJ was that a 2010 MRI showed  
 4 stable post-operative changes without evidence of stenosis, and that exams were  
 5 generally normal with respect to Plaintiff's extremities, muscle strength, and gait.  
 6 Tr. 26. Objective evidence alone is not a sufficient basis upon which to discount a  
 7 claimant's subjective complaints. *See Lester*, 81 F.3d at 834 (the ALJ may not  
 8 discredit the claimant's testimony as to subjective symptoms merely because they  
 9 are unsupported by objective evidence). Furthermore, the Court finds the ALJ's  
 10 characterization of the exam findings is not supported by substantial evidence, as  
 11 the record contains numerous objective findings that were abnormal and supportive  
 12 of Plaintiff's pain reports, including tenderness and reduced or painful range of  
 13 motion in the spine, rigidity of muscles, positive straight leg raise tests, positive  
 14 EMG testing, stiff movements, pain with motion in the extremities, and  
 15 occasionally impaired gait. Tr. 632, 636, 645, 650, 658, 701, 715, 963, 971, 979,  
 16 986-87, 993, 1018, 1421-22, 1427-29, 1615, 1665, 1774, 1757, 3822. The ALJ's  
 17 conclusion that the physical exam findings do not support Plaintiff's reports is not  
 18 supported by substantial evidence.

19 On remand the ALJ will reconsider Plaintiff's subjective reports.

20 **B. Opinion Evidence.**

21 Plaintiff argues the ALJ erred in rejecting the opinions of ARNP Nancy  
 22 Schwartzkopf and ARNP Joanna Kass. ECF No. 15 at 14-18.

23 An ALJ may discount the opinion of an "other source," such as a nurse  
 24 practitioner, if they provide "reasons germane to each witness for doing so."  
 25 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

26 **1. ARNP Nancy Schwartzkopf.**

27 Plaintiff's primary care provider, ARNP Nancy Schwartzkopf, provided two  
 28 statements in support of Plaintiff's claim. In July 2014 she noted Plaintiff's

1 diagnoses included chronic back pain with degenerative disc disease of the lumbar  
2 spine, and chronic right knee pain, and opined that Plaintiff would miss three days  
3 of work per month due to her conditions (also complicated by social issues). Tr.  
4 916-17. In March 2015 Ms. Schwartzkopf opined Plaintiff needed to lay down for  
5 1-2 hours per day due to pain and would miss four or more days of work per  
6 month, noting pain limited her ability to lift, bend, carry, sit, stand, and reach for  
7 any length of time. Tr. 918-19.

8 The ALJ addressed these opinions<sup>2</sup> along with a number of other treating  
9 source opinions and found them all to be due little weight for being vague and  
10 inconsistent with the record, noting “mostly normal physical exams” and normal  
11 findings regarding extremities, muscle strength, and gait. Tr. 27.

12 The Court finds the ALJ’s analysis is not supported by substantial evidence.  
13 There is nothing vague about the concrete limitations recommended by Ms.  
14 Schwartzkopf. Furthermore, as discussed above, the ALJ’s characterization of the  
15 record as containing mostly normal physical exams is not supported by substantial  
16 evidence, given the repeated objective findings of painful and limited range of  
17 motion, stiff movements, positive straight leg raise testing, and rigid musculature,  
18 many of which were noted by Ms. Schwartzkopf herself. On remand, the ALJ shall  
19 reconsider Ms. Schwartzkopf’s opinions.

20 **2. ARNP Joanna Kass.**

21 In April 2016, Plaintiff’s treating counselor ARNP Joanna Kass completed a  
22 medical source statement opining Plaintiff was markedly limited in her ability to  
23 perform activities within a schedule, maintain regular attendance, be punctual  
24 within customary tolerances, work in coordination with or proximity to others  
25 without being distracted by them, complete a normal workweek without

26 \_\_\_\_\_  
27 <sup>2</sup> The ALJ referred to Schwartzkopf as “Schuer,” citing to Schwartzkopf’s opinions  
28 at exhibits 9F and 10F. Tr. 27.

1 interruptions from psychologically based symptoms, perform at a consistent pace  
 2 without an unreasonable number and length of rest periods, accept instructions and  
 3 respond appropriately to criticism from supervisors, and travel in unfamiliar places  
 4 or use public transportation, along with numerous other moderate limitations. Tr.  
 5 1454-55. She further opined Plaintiff was markedly limited in maintaining social  
 6 functioning, would be off task 21-30% of a standard workweek, and would miss  
 7 four or more days of work per month. Tr. 1456.

8 The ALJ addressed this opinion<sup>3</sup> along with the state agency doctors, giving  
 9 the opinions little weight, finding them to be inconsistent with the record. Tr. 26.  
 10 The ALJ noted Plaintiff's own reports of being able to get along with others,  
 11 follow instructions, and handle stress, and the consultative examiner's findings of  
 12 relatively normal mental status exams results. *Id.*

13 The Court finds the ALJ's analysis is not supported by substantial evidence.  
 14 In disregarding the April 2016 opinion, the ALJ cited to Plaintiff's statements in  
 15 early 2014 and the results of a 2013 consultative exam. Tr. 26 (citing 397-404,  
 16 691-96). The record indicates Plaintiff first received treatment for mental health  
 17 complaints in the summer of 2014, largely relating to circumstantial stressors, with  
 18 complaints of depression and anxiety not appearing in earnest until later in the year  
 19 and into 2015. Tr. 971, 979, 988-1011, 1801. Plaintiff started treatment with Ms.  
 20 Kass in fall 2015 when her mental health began to deteriorate following her son's  
 21 enlistment in the armed services and her family's reports of her behavior becoming  
 22 increasingly unpredictable. Tr. 1743-47, 1761-64, 1787-89. Records following the  
 23 April 2016 opinion show ongoing issues with stress, anxiety, mood dysregulation,  
 24 anger, and lack of insight, eventually leading to her counselor recommending more  
 25 intensive treatment through Comprehensive Mental Health. Tr. 1547-50, 1695-96,  
 26 1713-14, 1724-25, 1730, 1733. The ALJ's selective citation of the records from  
 27

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28 <sup>3</sup> The ALJ referred to Kass as "Ross." Tr. 26.

1 prior to the onset of Plaintiff's significant mental health issues is not representative  
 2 of a broader development of the record. Therefore, the ALJ's discussion is not  
 3 supported by substantial evidence.

4 **C. Substance Use Materiality Finding.**

5 The Social Security Act bars payment of benefits when drug abuse or  
 6 alcoholism (DAA) is a contributing factor material to a disability claim. 42 U.S.C.  
 7 §§ 423(d)(2)(C) & 1382(a)(3)(J); *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir.  
 8 2001). If there is evidence from an acceptable medical source that a claimant has a  
 9 substance abuse disorder and the claimant succeeds in proving disability, the  
 10 Commissioner must determine whether DAA is material to the determination of  
 11 disability. 20 C.F.R. § 416.935; SSR 13-2p (Feb. 20, 2013), *available at* 2013 WL  
 12 621536. That is, the ALJ must perform the sequential evaluation process a second  
 13 time, separating out the impact of the claimant's DAA, to determine if they would  
 14 still be found disabled if they stopped using drugs or alcohol. *Bustamante*, 262  
 15 F.3d at 955. DAA is a materially contributing factor if the claimant would not meet  
 16 the SSA's definition of disability if the claimant were not using drugs or alcohol.  
 17 20 C.F.R. § 416.935(b).

18 Plaintiff argues the ALJ's analysis of the materiality of her substance use is  
 19 not supported by substantial evidence. ECF No. 15 at 18-20. Specifically, Plaintiff  
 20 takes issue with the ALJ's use of evidence from later in the relevant period to find  
 21 alcohol use to have been material for the entire period, when the record indicates  
 22 alcohol abuse did not begin until 2017 at the earliest. *Id.* Defendant argues the ALJ  
 23 reasonably pointed to evidence from sober periods to support her finding that  
 24 Plaintiff's functioning was relatively normal when she was not abusing alcohol,  
 25 reasonably concluding that Plaintiff's substance abuse materially impacted her  
 26 mental health. ECF No. 16 at 9-10.

27 As this claim is being remanded for other proceedings, the ALJ shall also  
 28 reconsider the materiality of substance abuse for the periods where there is

1 evidence of such use. The Court notes that Plaintiff did not appear to have an  
2 alcohol abuse problem prior to 2017. The first documented instance of Plaintiff  
3 being observed to smell of alcohol was in February 2017. Tr. 2142. Plaintiff  
4 consistently reported early 2017 as the beginning of her severe issues with alcohol,  
5 in response to physical and emotional pain, which is also supported by her ex-  
6 husband's statements. Tr. 1486, 1508, 1530. Throughout 2017-2019, Plaintiff  
7 consistently admitted to alcohol use and was noted to appear intoxicated or in  
8 alcohol withdrawal. Tr. 1481, 1528, 1554, 1557, 1563, 1565, 2774, 2889-90, 3183,  
9 3476, 3651, 3656, 3805. These events did not occur in the earlier time period, and  
10 there is no evidence of problematic alcohol use prior to 2017. The ALJ's  
11 discussion does not differentiate between the period of time prior to the onset of  
12 Plaintiff's alcohol abuse and her functioning as of 2017.

## VIII. CONCLUSION

14 Plaintiff argues the decision should be reversed and remanded for the  
15 payment of benefits. The Court has the discretion to remand the case for additional  
16 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292  
17 (9th Cir. 1996). The Court may award benefits if the record is fully developed, and  
18 further administrative proceedings would serve no useful purpose. *Id.* Remand is  
19 appropriate when additional administrative proceedings could remedy defects.  
20 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court  
21 finds that further development is necessary for a proper determination to be made.

22 The ALJ's decision is not supported by substantial evidence. On remand, the  
23 ALJ shall reevaluate Plaintiff subjective complaints and the opinions from Ms.  
24 Kass and Ms. Schwartzkopf, along with conducting a new DAA materiality  
25 assessment, taking into account Plaintiff's changing circumstances throughout the  
26 relevant period.

1 Accordingly, **IT IS ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is

3 **GRANTED IN PART.**

4 2. Defendant's Motion for Summary Judgment, **ECF No. 16**, is

5 **DENIED.**

6 3. The matter is **REMANDED** to the Commissioner for additional  
7 proceedings consistent with this Order.

8 4. An application for attorney fees may be filed by separate motion.

9 The District Court Executive is directed to file this Order and provide a copy  
10 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and  
11 the file shall be **CLOSED**.

12 DATED September 30, 2022.



13 A handwritten signature in blue ink that reads "James A. Goede".  
14 JAMES A. GOEKE  
15 UNITED STATES MAGISTRATE JUDGE